SYARIKAT KAYU BERSATU SDN. BHD. & 2 ORS.

v.

UMW (SARAWAK) SENDIRIAN BERHAD

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J.
[CIVIL APPEAL NO. MR. 2 OF 1994]
16 NOVEMBER 1994

PRACTICE & PROCEDURE: *Appeal against decision of Sessions Court Judge allowing judgment against the appellants/defendants - Claim in respect of hire purchase agreement - No memorandum of appeal filed - Respondent raising issue whether appeal properly brought before the Court - Appellants relying on O.49 r.6 SCR 1980 - Consideration of O.55 RHC 1980.*

This was an appeal against the decision of the learned Sessions Court Judge allowing judgment against the appellants/defendants on 22 March 1994 in respect of a claim for recovery of monies under a hire purchase agreement which agreement was assigned to the plaintiff/respondent.

At the commencement of the hearing of the appeal the respondent raised the issue of whether the appeal was properly before the Court as there was no memorandum of appeal lodged in this case. The Counsel for the appellants relied on O.49 r.6 of the Subordinate Courts Rule 1980 (SCR) which stipulated *inter alia* that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

Held:

[1] Where an appellant intends to proceed under O.49 r.6 of the SCR 1980, the relevant provisions in the SCR 1980 and the Rules of the High Court 1980 (RHC) should be construed as follows:

(i) notice of appeal in Form 140 to be filed within 14 days from the date of decision and notice to be served on every party to the proceeding "within the time limited for the filing of appeal to the Registrar of the High Court" which appears to be 14 days as well;

(ii) within 3 weeks of filing the notice of appeal the appellant shall file the record of appeal in the High Court containing the relevant documents as stated in O.49 r.6 of the SCR 1980 but excluding notes of evidence, the grounds of judgment or any memorandum of appeal;

(iii) the Court appealed from on receiving the notice of appeal should comply with O.49 r.2 of the SCR 1980 and the other relevant provisions so as to enable the appeal to be brought before the High Court. This means that the necessary notice under Form 141 should be issued;

(iv) the appellant must also comply with the relevant provisions under O.55 of the RHC 1980, i.e. to file the necessary memorandum of appeal. A memorandum of appeal should not be taken as forming part of the record of appeal. Order 49 r.6 of the SCR 1980 should not be interpreted to mean that the other provisions of O.55 of the RHC 1980 should be ignored; and

(v) that the hearing is to be before a Judge in Chambers.

[2] The appellants are not precluded from proceeding with this appeal due to their failure to file the memorandum of appeal as the prescribed time for filing has not even commenced due to the fact that Form 141 has yet to be served on them.

[3] Due to the defects when this appeal was heard the Court directed the Sessions Court which heard this case and the appellants to first comply with the procedural requirements. Thereafter another date would be fixed for the Court to properly hear the appeal.

[Appellants directed to comply with procedural requirements for appeal. Date for appeal to be fixed. No order as to costs]

Legislation referred to:
Hire Purchase Registration Ordinance (Sarawak Cap.71);
Subordinate Court Rules 1980, O. 1 r. 2, O. 28 rr. 9 & 10, O. 49 rr. 2 & 6
Subordinate Courts Act 1955, s. 4
Rules of the High Court 1980, O. 55

For the appellants - Thai Choi Yu; M/s. Tai Choi Yu & Co.
For the respondents - Chundang Jugah; M/s. Goh & Partners

JUDGMENT

Richard Malanjum J:
This is an appeal against the decision of the learned Sessions Court Judge made on the 22 March 1994 allowing judgment to be entered against the appellants/defendants.

The claim of the respondent/plaintiff is for the recovery of the sum of RM50,452, overdue interest of RM5,497.27, interest and costs in connection with a hire purchase agreement with Terus Kredit Sdn. Bhd. (renamed Seabanc Kredit Sdn. Bhd. later on).

The 1st defendant is the principal debtor whilst the 2nd and 3rd defendants are the guarantors cum indemnifiers. On the 30 July 1986 the said hire-purchase agreement and the guarantee cum indemnity (hereinafter called "the hire-purchase agreement" and "guarantee cum indemnity" respectively) were assigned to the plaintiff.

In the lower Court three issues were agreed to be determined by the Court, namely,

(i) whether the hire-purchase agreement is void for non-registration under the hire purchase Registration Ordinance (Sarawak Cap.71);

(ii) whether the guarantee can be assigned to 3rd party without the consent of the guarantors; and

(iii) whether the guarantee is also an indemnity.

Accordingly, the hearing proceeded under O. 28 r. 9 of the Subordinate Court Rules 1980 (hereinafter called "the SCR 1980") and pursuant to O. 28 r. 10 of SCR 1980 the learned Sessions Court Judge gave judgment in favour of the plaintiff.

At the commencement of the hearing of this appeal the issue of whether this appeal is properly before this Court was brought up. It is obvious that there is no memorandum of appeal being lodged in this case. But learned Counsel for the appellants relied on O. 49 r. 6 of the SCR 1980 which reads as follows:

6. (1) Notwithstanding anything contained in this order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

(2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.

(3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of-

(a) the application for the decision;

(b) the statement of claim, and where defence has been filed, the statement of defence;

(c) all affidavits filed in support of or in opposition to the application; and

(d) the decision appealed from,

but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

The learned Counsel for the respondent submitted that he would agree to the mode of the appeal provided it could be confined to the issues argued before the Sessions Court. To this the learned Counsel for the appellants agreed. Subject to that agreement I proceeded to hear the argument.

It is pertinent to note that there is no reciprocal provision for O. 49 r. 6 of SCR 1980 to be found, in particular, under O. 55 of the Rules of the High Court 1980 (hereinafter called "the RHC 1980"). Order 55 deals with appeals to the High Court from the Subordinate Courts and statutory bodies. But the reasons I can think of for such a situation is that in view of the wordings of O. 49 r. 6 of SCR 1980 there appears to be no necessity to have such a reciprocal provision in the RHC 1980. But the flaw of that reasoning is that there is no legal basis to allow the provisions of the SCR 1980 to govern the proceedings in the High Court. After all the SCR 1980 is intended for the proceedings in the Subordinate Courts. (See: **Order 1 Rule 2 of Subordinate Courts Rules 1980; s. 4 of the Subordinate Courts Act 1955).**

On the other hand what should an appellant do in view of the absence of any clear provision? O. 49 r. 6 of the SCR 1980 clearly stipulated that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

Having considered the relevant provisions in the SCR 1980 and RHC 1980 pertaining to the issue before this Court I am of the view that they should be construed, where an appellant intends to proceed under O. 49 r. 6 of the SCR 1980, in the manner as follows:

(i) Notice of appeal in Form 140 to be filed within 14 days from the day on which the decision was pronounced and to serve the notice on every other party to the proceeding "within the time limited for the filing of appeal to the Registrar of the High Court". After perusing the relevant provisions I am of the opinion that the period of serving on the other party or parties of the notice of appeal appears to be 14 days as well:

(ii) within 3 weeks after filing of the notice of appeal the appellant shall file the record of appeal in the High Court containing the relevant documents as stated in O. 49 r. 6 (3) of the SCR 1980 but excluding notes of evidence, the grounds of judgment or any memorandum of appeal;

(iii) the Court appealed from on receiving the notice of appeal should comply with O. 49 r. 2 and the other relevant provisions so as to enable the appeal to be brought before the High Court. This means that the necessary notice under Form 141 should be issued;

(iv) the appellant must also comply with the relevant provisions under O. 55 of the RHC 1980, i.e. to file the necessary memorandum of appeal. On this point learned Counsel for the Appellant highlighted the provision of O. 49 r. 6. But there is a confusion I think. In the first place a memorandum of appeal should not be taken as forming part of the record of appeal - (See: *Siang Galau v. Ang Wak Hiong* [1994] 1 MLJ 42). So even though O. 49 r. 6 specifically excluded any memorandum of appeal I do not think that the provision should be interpreted to mean that the other provisions of O. 55 of RHC 1980 should be ignored; and

(v) that the hearing is to be before a Judge in Chambers.

Thus, in the present case there is no notification issued by the Subordinate Court in Form 141 to the appellants but I do not think that the appellants are now preluded from proceeding this appeal due to their failure to file the memorandum of appeal. After all the prescribed time for filing has not even commenced as Form 141 is yet to be served on them.

As such, even though I have heard the arguments of the parties on the substantive issues in this case I am of the opinion that due to the defects when this appeal was heard I should direct that the Sessions Court which heard this case and the appellants should first comply with the procedural requirements. Thereafter another date is to be fixed for this Court to properly hear the appeal. During that time the parties hereto may adopt what have been submitted earlier on. It is to be noted that no view of this Court has been expressed on the arguments of the parties on the substantive issues. I have made such a direction in the interest of justice. If I were to consider this appeal as it stands then it is obvious that in view of the absence of the memorandum of appeal it may be dismissed summarily. But I do not think that is being fair to the appellants especially when no notification in Form 141 has been issued.

As this matter is yet to be finally concluded I make no order as to costs.